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# In the Supreme Court of the United States

OCTOBER TERM, 1942

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No. 229

ALABAMA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinions of the Court of Appeals (2 R. 982-1020, 864-892)<sup>1</sup> are reported in 94 F. (2d) 601 and 128 F. (2d) 280. The memorandum opinion of the Supreme Court of the District of Columbia (2 R. 944-945), together with its findings of fact and conclusions of law (2 R. 945-951), is not officially reported. The opinions of the Federal Power Com-

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<sup>1</sup> The two volumes of printed record filed with the petition in this case (consisting of an appendix to petitioner's brief in the Court of Appeals and a Transcript of Record in the Supreme Court) will be referred to in this brief in opposition as 1 R. and 2 R., respectively.

mission are reprinted in the record (1 R. 561-608, 612-615, 781-798).

#### JURISDICTION

The judgment of the Court of Appeals (2 R. 893) was entered on March 30, 1942. A petition for rehearing was denied on April 29, 1942 (2 R. 910). The petition for a writ of certiorari was filed on July 14, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

Following extensive hearings, the Federal Power Commission, by opinion and orders, determined (pursuant to sections 3 (13) and 4 (b) of the Federal Power Act) the actual legitimate original cost of petitioner's licensed hydroelectric project, disallowing certain items claimed as cost by petitioner, and required the setting up of accounts to reflect this determination. On appeal from a decree of the Supreme Court of the District of Columbia refusing to enjoin the Commission's orders, the court below affirmed the Commission's determination except as to three items which were remanded for further proceedings. Petitioner did not seek certiorari. Following hearing on the remanded items the Commission supplemented its previous determination and ordered petitioner to correct its accounts accordingly and to charge the disallowed amounts of claimed cost to surplus. On request

for rehearing, the Commission stayed its order and directed petitioner to show cause in writing why the prescribed accounting requirements should not be made effective and to submit such accounting treatment as petitioner proposed for disposition of the disallowed amounts. In response to the order to show cause, petitioner proffered no accounting or other testimony and admitted that it could not "propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission." Thereupon, the Commission dissolved the stay and directed compliance with the accounting requirements. On review, the Commission's orders were affirmed by the court below. The questions are:

1. Whether petitioner may now question the correctness of the Commission's determination of the actual legitimate original cost of petitioner's licensed project.<sup>2</sup>

2. Whether the Commission may require petitioner to correct its accounts to reflect such determination by charging the disallowed items of claimed cost to surplus.

#### STATUTES INVOLVED

The relevant provisions of the Federal Power Act of 1935 are set forth in the Appendix, *infra*, pp. 19-25.

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<sup>2</sup> In the event that the petition for a writ of certiorari is granted, respondent reserves the liberty to urge the correctness of the Commission's determination.

## STATEMENT

Petitioner, Alabama Power Company, is the holder of a license dated June 27, 1921<sup>3</sup> (1 R. 55-69), issued by the Federal Power Commission under the Federal Water Power Act, for the Mitchell Dam hydroelectric project on the Coosa River in Alabama (2 R. 945). Pursuant to the provisions of the statute and of the license, licensee on March 29, 1930, filed with the Commission a verified statement claiming \$10,646,056.76 as the actual legitimate original cost of the project as of December 31, 1925 (1 R. 88-119). The results of an audit by the Commission staff were embodied in a preliminary accounting report dated May 31, 1930 (1 R. 119-150). Those expenditures which were considered proper charges to the project were recommended for approval and the remainder of the claim, together with certain proposed additions, was suspended for the Commission's consideration. This report was served on licensee (2 R. 946), which filed its protest thereto and requested a hearing (1 R. 150-153). Pursuant to order (1 R. 153-154), a hearing was held before the full Commission with submission of oral and documentary evidence, briefs, and oral argument by counsel (2 R. 946). On June 30, 1932, the Commission rendered an

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<sup>3</sup> The Alabama Power Company to which the license was issued in 1921 was consolidated with two other companies in 1927 to form petitioner Alabama Power Company (2 R. 859).

opinion (1 R. 561-608), and on November 7, 1932, entered an order (1 R. 15-17) determining the actual legitimate original cost of the project.<sup>4</sup> In so doing the Commission disallowed certain items of the claimed cost.<sup>5</sup> Upon request for rehearing (1 R. 608-612), the Commission on December 19, 1932, rendered a second opinion (1 R. 612-615) and order (1 R. 18), making a minor adjustment in its determination of the actual legitimate original cost of the project.

Thereafter, on May 31, 1933, petitioner filed a bill of complaint in the Supreme Court of the District of Columbia seeking to enjoin enforcement of the Commission's orders, taking exception to all the

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<sup>4</sup> The Commission's order further provided (1 R. 17):

"1. That the licensee establish and maintain control ledger sheets or accounts with reference to said project showing a total debit balance in its fixed capital accounts beginning with an entry of \$7,098,512.51 as the actual legitimate original cost of said project as of December 31, 1925;

"2. That said licensee establish and maintain subsidiary ledger sheets or accounts or records, showing and substantiating all entries in such control account, and classifying the total for fixed capital in appropriate detail and in accordance with the commission's rules, regulations, and decisions."

<sup>5</sup> The principal items disallowed were: (1) construction fee paid to licensee's affiliate (1 R. 580-581); (2) excess over incremental cost of supplying electric energy for use in construction of the project (1 R. 582-583); (3) taxes and interest not applicable to the construction period (1 R. 581, 583-584); (4) portion of \$3,500,000 Undistributed Fixed Capital, which petitioner had set up as a charge to lands and water rights, in excess of actual cost of lands and water rights (1 R. 569-574).

disallowed items (2 R. 910-911).<sup>6</sup> Following a trial on the merits,<sup>7</sup> the court made findings of fact and announced conclusions of law (2 R. 945-951), filed a memorandum opinion (2 R. 944-945), and entered a decree on December 11, 1935, dismissing the complaint (2 R. 951).

On appeal (2 R. 951-954) the United States Court of Appeals for the District of Columbia reviewed the provisions of the statute and concluded (2 R. 987) that the Commission was authorized "to determine the actual legitimate original cost of a project and to require a licensee to set up its books showing the cost as thus determined." The court reviewed the Commission's determinations and affirmed most of them, but held that (1) the Commission should have found and allowed (a) "the total cost, exclusive of profit" of electric energy furnished by petitioner to the project during its construction, instead of merely the incremental or out-of-pocket cost of such energy (2 R. 1016-1018), and (b) the project's portion of the actual legitimate original cost of Lock 15 water rights (2 R. 1007-1008) and that (2) "since the case must be returned to the Commission in re-

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<sup>6</sup> This was prior to the enactment of section 313 (b) of the Federal Power Act, providing for direct review in the circuit courts of appeals.

<sup>7</sup> At the trial, licensee's accounting witness testified that to set up the accounts required by the Commission's orders "eliminating from the fixed capital records of Alabama Power Company the items which have been disallowed as the cost of this project" would cost about \$5,000 (2 R. 801).



spect of the foregoing items, it would be proper for the Commission to allow the licensee further opportunity to introduce evidence of the cost of financing, engineering, and promotional services prior to 1913 included in the Power Company's claimed figure of \$3,500,000" (2 R. 1020). Accordingly the decree of the trial court was reversed with orders to direct the Commission to proceed in accordance with the opinion (2 R. 1020-1021). Petitioner's motion for modification of the decree (2 R. 1021-1022) was denied January 6, 1938 (2 R. 1026). Petitioner did not seek certiorari.

The Commission held a hearing on the remanded items (1 R. 616-673) and on November 26, 1940, in accordance with its opinion (1 R. 781-798), entered an order (1 R. 19-22) allowing \$51,966.58 as the total cost of electric energy furnished to the project during construction, and \$66,603.78 as the actual legitimate original cost of that part of the water rights at Lock 15 allocable to the Mitchell Dam project.<sup>8</sup> The Commission found that there was no evidence before it of the cost of the financing, promotional, and engineering services, and no allowance therefor was made (1 R. 787-788). The order required petitioner to set up its books showing the amounts allowed as actual legitimate original cost and to transfer amounts carried in the asset accounts not representing the cost of some

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<sup>8</sup> Because of these additional allowances \$26,540.82 more was allowed for interest during construction.

physical property to be charged against earned surplus.<sup>9</sup>

On December 21, 1940, petitioner applied for rehearing (2 R. 22-27), challenging practically all the determinations of the Commission, including those which the Court of Appeals had previously affirmed and of which no further review had been sought. In addition, it alleged that the provisions of the order set forth above were void "because Licensee was given no notice that any such require-

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<sup>9</sup> The Commission's order of November 26, 1940, provided (1 R. 21-22):

"(C) The amount of \$3,657,080.83 representing the total of all items disallowed, exclusive of \$183,396.22, the disallowed part of claimed cost appertaining to water rights at Lock 15, be transferred from the project accounts and charged to the earned surplus account pursuant to and in accordance with the applicable provisions of said Uniform System of Accounts Prescribed for Public Utilities and Licensees;

"(D) The amount of \$152,814.31 for organization expenses, the amount of \$66,603.78 for the cost of the Mitchell Dam portion of the Lock 15 water rights, and \$969.97 for interest, allowed in addition to Licensee's original claimed cost shall be charged to the project accounts and the earned surplus account concurrently credited with the total of these items;

"(E) All amounts now carried in the asset accounts as part of the original charges to the cost of the project up to and including December 31, 1925, and not otherwise disposed of by this order, and which do not represent the cost of some physical property other than this project, shall be transferred from such accounts, both control and subsidiary, in which included, and the net amount thereof charged to earned surplus account, pursuant to and in accordance with the applicable provisions of said Uniform System of Accounts."

ments were proposed and was given no opportunity to be heard on any of such requirements. If Licensee was required to comply with any of such requirements, Licensee would be deprived of property without due process of law" (1 R. 26). On January 21, 1941, the Commission stayed Paragraphs C, D, and E of its order and directed licensee to "(1) show cause in writing, under oath, why the accounting instructions and requirements contained in said Paragraphs (C), (D), and (E) of said order should not be made effective and enforced, and (2) submit to the Commission such accounting treatment as the licensee may propose for disposition of the disallowed items of claimed cost" (1 R. 29). In response to the order to show cause (1 R. 29-40), petitioner claimed that the accounting disposition of the disallowed items of cost was not an issue in the proceedings before the Commission (1 R. 29), that petitioner intended to seek court review of the Commission's order which might "affect the proper accounting treatment for the disposition thereof", and that "Licensee respectfully submits that it cannot propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission" (1 R. 39). Upon consideration of the response the Commission found that petitioner's arguments were substantially the same as those which the Commission had rejected by opinion and order in *Northern States Power Co. Licensee*,

33 P. U. R. (N. S.) 279, which was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit. *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141. The Commission further found that petitioner had not proffered any testimony or evidence and had not submitted any other accounting treatment for disposition of the disallowed amounts, and accordingly on April 26, 1941, dissolved the stay and directed petitioner to comply with the order of November 26, 1940 (1 R. 47-48). An application for rehearing (1 R. 49-52) was denied on May 6, 1941 (1 R. 54).

On March 20, 1941, petitioner, pursuant to section 313 (b) of the Federal Power Act, filed a petition for review in the court below (1 R. 1-14), challenging practically all the determinations of the Commission, including those made in the first order and affirmed by the court below in the first appeal, as well as the disposition by the Commission of the items on the remand, and the accounting disposition made by the Commission of the disallowed items.<sup>10</sup>

The court below affirmed the Commission's determination of actual legitimate original cost (2 R. 868-892) and held that the accounting disposition of the disallowed items made by the Commission

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<sup>10</sup> No review was sought of the Commission's allowance for the item of total cost, exclusive of profit, of electric energy, furnished by petitioner during construction of the project (2 R. 868).

was in all respects proper (2 R. 869-892). It entered judgment accordingly (2 R. 893). A petition for rehearing (2 R. 893-908) was denied (2 R. 910).

#### ARGUMENT

The court below held that the Commission properly determined the cost of the Lock 15 water rights (2 R. 866-868), that the Commission properly refused to make any allowance for the alleged cost of financing, engineering, and promotional services rendered prior to 1913 since no evidence was offered on this point (2 R. 868-869),<sup>11</sup> and that the accounting disposition of the allowed and disallowed items of cost was made by the Commission after notice and hearing, and was in all respects proper (2 R. 871-892). This decision was clearly correct.

1. As the court below noted (2 R. 866-868), the Commission determined the cost of the remanded Lock 15 water rights by applying the formula which the court had approved on the first appeal. *Alabama Power Co. v. McNinch*, 94 F. (2d) 601, 614 (App. D. C.); see 2 R. 868. Petitioner did not seek review of the first judgment of the court below and in the circumstances cannot now urge that the formula adopted was erroneous. *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451; *Sprague v. Ticonic National Bank*, 307 U. S. 161,

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<sup>11</sup> Petitioner does not urge as error the holding of the court below on this point, and no review is sought on this item of cost.

167-168; *Falstaff Brewing Corp. v. Thompson*, 101 F. (2d) 301, 306 (C. C. A. 8). The Commission's prior determination of the cost of project lands, and of the amount of taxes and interest during construction, and its disallowance of the fees paid to the affiliated Dixie Construction Company were affirmed by the court below on the first appeal. *Alabama Power Co. v. McNinch*, 94 F. (2d) 601, 622 (App. D. C.); see 2 R. 951-954. Petitioner, not having then sought further review, may not now question (Pet. 15-17) those determinations and disallowance. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 75-78; *Stoll v. Gottlieb*, 305 U. S. 165; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166.

2. The Commission's order requiring petitioner to correct its accounts to reflect actual legitimate original cost by charging the disallowed items of claimed cost to surplus was authorized by and is in accordance with the provisions of the Federal Power Act. *Alabama Power Co. v. McNinch*, 94 F. (2d) 601, 606 (App. D. C.); *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141 (C. C. A. 7); *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942. Any accounting disposition of the disallowed items which would not clearly segregate them from the actual legitimate original cost account would run counter to the objectives of the Federal Power Act.

Section 4 (b) of the act requires that upon completion of a licensed project the licensee shall file with the Commission a statement, under oath, "showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands", and authorizes the Commission "to determine the actual legitimate original cost of and the net investment in" such project.<sup>12</sup> Actual legitimate cost is the basis upon which excessive profits are determined and expropriated. During the first twenty years the license is in force such profits may be expropriated to the Government under section 10 (e) of the act by increasing the annual charges paid by the licensee. After the first twenty years of operation excessive profits are segregated in an amortization reserve under section 10 (d) for use in reduction of the licensee's net investment in the project. Actual legitimate original cost also constitutes the rate base used by the Commission in fixing rates (under section 19) which are not regulated by the states and in regulating interstate rates (under section 20). Actual legitimate original cost likewise controls the "just and fair compensation" paid a licensee under section 16 for use of its project in a war or other

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<sup>12</sup> Section 3 (13) defines "net investment" in a project as the actual legitimate original cost thereof, plus cost of additions and betterments and less certain deductions not here involved.

emergency "involving the safety of the United States." The amount allowed by the Commission as actual legitimate original cost determines the price the Government pays a licensee upon acquisition of its project at the expiration of the license under section 14 or upon a court sale of the project, following a revocation of the license under section 26. *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 427-428; *Clarion River Power Co. v. Smith*, 59 F. (2d) 861 (App. D. C.), certiorari denied, 287 U. S. 639.

To effectuate the purposes of the act, a licensee's accounting must accordingly be adjusted to reflect the Commission's determination of actual legitimate original cost. Section 301 (a) authorizes the Commission to prescribe a system of accounts with which every licensee is required to comply, carrying with it the authority to require proper accounting adjustments. *Kansas City So. Ry. Co. v. United States*, 231 U. S. 423, 440; *Norfolk and Western Ry. Co. v. United States*, 287 U. S. 134, 141.

Petitioner's contention that the Commission was without jurisdiction to enter its accounting order on the ground that "such an order is in derogation of the laws of the State regulating capitalization of utilities" (Pet. 21-22) is plainly without substance. Section 301 (a) of the act in requiring that "every licensee" shall keep such accounts as the Commission prescribes, expressly provides that "nothing in this Act shall relieve any public utility



from keeping any accounts \* \* \* which such public utility may be required to keep by or under authority of the laws of any State." The corrective accounting prescribed by the Commission in no way infringes on state authority since "each Commission is empowered to act within its own field." *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141, 144 (C. C. A. 7); *Northwestern Electric Co. v. Federal Power Commission*, 125 F. (2d) 882, 885 (C. C. A. 9); *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942; see S. Rep. No. 621, 74th Cong., 1st Sess., p. 53.<sup>13</sup> As the court below stated (2 R. 871—

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<sup>13</sup> The statement in section 201 (a) of Part II of the act that the Commission's jurisdiction over generation, transmission, and sale of electric energy at wholesale in interstate commerce by electric utility companies shall "extend only to those matters which are not subject to regulation by the States" is irrelevant since the language of section 201 (a) clearly shows that this statement has no application to the Commission's jurisdiction over projects licensed under Part I of the act.

Petitioner's contention (Pet. 17) that "the record is devoid of any notice to the Alabama Public Service Commission that Respondent proposed the action here challenged," as allegedly required by section 302 (b) of the act, is raised for the first time in the petition for certiorari, and in view of section 313 (b) of the act cannot be considered. Moreover, the contention is clearly erroneous. The Commission's Uniform System of Accounts was developed in closest cooperation with state commissions (17th Annual Report of the Federal Power Commission (1937), p. 5), and the audit of the records underlying petitioner's claim in this case was made jointly with the Alabama Public Service Commission (1 R. 126).

872), Alabama could require petitioner to keep a separate set of books for purposes of state law, and if the company chose it might keep a third set for its own purposes.

Petitioner's contention (Pet. 16-17) that, despite the "full, elaborate and long-continued hearings" (2 R. 888) held by the Commission, the order prescribing accounting requirements was entered without notice or hearing is similarly without merit. The Commission stayed its order for the express purpose of permitting petitioner to show cause why the accounting requirements it had prescribed should not be made effective and to submit such accounting treatment as petitioner proposed for disposition of the disallowed amounts (1 R. 29). In response to the order to show cause, petitioner admitted that it could not "propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission," and petitioner neither proffered nor indicated any accounting or other testimony (1 R. 39). The order to show cause was sufficient. *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942; see also *Northwestern Electric Co. v. Federal Power Commission*, 125 F. (2d) 882 (C. C. A. 9).<sup>14</sup>

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<sup>14</sup> "The Fifth Amendment guarantees no particular form of procedure." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351.

The fact that petitioner was the successor to the original licensee upon the consolidation of the latter with two other companies "in no way affects the actual legitimate original cost" of this project (2 R. 882). Section 8 of the Act provides that upon transfer of a license "any successor or assign of the rights of such licensee \* \* \* shall be subject \* \* \* to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder \* \* \*". See *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942.

As the Court of Appeals held (2 R. 882-889), the decision in *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, does not support petitioner's objections (Pet. 9, 17-19) to the elimination from its project accounts of the difference between actual legitimate original cost and the investment of petitioner to acquire the project of its predecessor. This Court was there concerned with the reclassification of the accounts of the telephone companies, subject to regulation by but which are not licensees of the Government, on the basis of original cost, and with the determination of the nature and proper disposition of the excess in invested value over original cost. In the present case, however, petitioner voluntarily obtained a license for its project and thereby accepted the statutory standard of actual legitimate origi-

nal cost (section 6; see *Northern States Power Co., Licensee*, 33 P. U. R. (N. S.) 279, aff'd, *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141 (C. C. A. 7). Since the disallowed amounts were found not to be part of the actual legitimate original cost of petitioner's project, they necessarily represent "false rather than genuine" items and there is "no further question to be determined concerning them" (2 R. 888-889).

#### CONCLUSION

The decision below is correct. There is no conflict, and the case presents no question calling for further review. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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AUGUST 1942.